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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Interstate Brands Corporation

File: B-225550

Date: March 3, 1987

DIGEST

1. Protest that solicitation improperly was restricted to Indian-owned firms pursuant to the Buy Indian Act is dismissed as untimely where protester knew of restriction prior to bid opening but failed to protest before that time.

2. Bureau of Indian Affairs' determination that a firm meets eligibility criteria for responding to Buy Indian Act procurement will be questioned by General Accounting Office only where arbitrary or unreasonable. Bureau's decision that Indian-owned firm is eligible for award where it agrees to perform at least 51 percent of the deliveries of bakery products with its own labor force is not unreasonable.

3. Fact that Indian-owned firm's bid on procurement set aside pursuant to Buy Indian Act, which agency has concluded is reasonable in price, is 9.5 percent higher than non-Indian firm's prior year contract price does not in itself require that the bid be rejected as unreasonably high, since it is inherent in set asides that awards often will be made at higher prices than could be obtained in unrestricted competition.

DECISION

Interstate Brands Corporation (Interstate) protests a contract award to B & L Procurement under Department of the Interior, Bureau of Indian Affairs (BIA), invitation for bids (IFB) No. A00-0523. Interstate also requests reimbursement for the costs it incurred in submitting this protest.

We deny the protest in part and dismiss it in part. We deny the claim.

The solicitation, to obtain bakery products for an Indian school, was issued as a total set-aside for certified Indian/Alaska Native Economic Enterprises pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1982). Notice of the procurement

was published in the Commerce Business Daily (CBD) on August 7, 1986. On August 18 the solicitation was issued to any requesting firms, and also was mailed to approximately 15 certified Indian firms that BIA believed could meet its needs. B & L was the only company that submitted a bid. The contracting officer reviewed the bid and requested B & L to submit additional information to determine if B & L was eligible for the set-aside award. Subsequently, B & L submitted the requested information, and the contracting officer determined that B & L met the eligibility requirements and awarded the company the contract.

Interstate first protests that BIA awarded a sole-source contract to B & L in violation of the requirement in the Competition in Contracting Act of 1984, 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985), for full and open competition in procurements issued by federal executive agencies.

We disagree with Interstate's characterization of the award as sole-source. This is not a case where an agency determined that only one source could meet its minimum needs, and issued a solicitation only to that firm; rather, BIA published notice of the procurement in the CBD, and specifically solicited offers from 15 certified, eligible firms. The fact that only one company responds to a solicitation does not, in itself, change a competitive procurement into a sole-source procurement. Treadway Inn.--Request for Reconsideration, B-221559.2, July 31, 1986, 65 Comp. Gen. ___, 86-2 C.P.D. ¶ 130.

Further, we will not consider Interstate's protest to the extent Interstate is arguing that BIA improperly restricted the competition to Indian-owned firms. Under our Bid Protest Regulations, a protest based on an impropriety apparent from the face of the solicitation must be filed before the time set for bid opening. 4 C.F.R. § 21.2(a)(1) (1986). Here, the solicitation clearly stated that the procurement was a total Buy Indian Act set-aside. Because notice of the procurement was published in the CBD on August 7, Interstate is charged with constructive notice of the solicitation and its contents. Julie Research Laboratories, Inc., B-219838, et al., Sept. 4, 1985, 85-2 C.P.D. ¶ 267. Since Interstate did not file a protest with BIA concerning the set-aside restriction until November 4 (and with our Office until December 10), after the September 18 bid opening date, the protest is untimely in that regard and we will not consider it on the merits. See NJCT Corp., B-219455, July 22, 1985, 85-2 C.P.D. ¶ 70.

Interstate next protests that B & L will be supplying bakery products manufactured by a non-Indian firm; will be leasing trucks from the non-Indian firm; and will be permitting the non-Indian firm to deliver the bakery products with its own employees. Interstate asserts that B & L only will be responsible for billing, inventory, accounting and scheduling deliveries, and concludes that B & L therefore should not be considered eligible to receive a Buy Indian Act set-aside award.

The Buy Indian Act provides that:

> "So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

The Secretary of the Interior, acting through the BIA Commissioner, has broad discretionary authority to implement this statute, and we have held that defining the criteria a firm must meet to qualify as an Indian industry and the quantum of evidence required to establish compliance with the established criteria falls within that broad discretion. See 50 Comp. Gen. 94, 96 (1970); Department of the Interior--request for advance decision, B-188888, Dec. 12, 1977, 77-2 C.P.D. ¶ 454. We will disturb such decisions only where they are arbitrary, unreasonable or in violation of law or regulation.

Pursuant to BIA policy, products of Indian/Alaska Native Industry economic enterprises include any products, goods, supplies or services that can be provided by a certified economic enterprise that produces them through its own labor or effort or is a regular dealer in such goods or services. BIA reports that B & L is a certified economic enterprise and a regular dealer in subsistence items. BIA adds that under the present solicitation delivery is a significant portion of contract performance and that B & L has agreed to perform at least 51 percent of the deliveries with its own labor force. Given these factors, we do not find that BIA's decision that B & L is an eligible Indian-owned firm is unreasonable. In this regard, there is no requirement in the solicitation or BIA's policy that the Indian-owned firm deliver products that it manufacturers or own the truck that it uses to deliver the products.

To the extent Interstate argues that B & L will not comply with the requirement to perform more than 51 percent of the deliveries with its own labor force, the protest involves a matter of contract administration, which our Office does not review. See Little Susitna Co., B-222816, June 17, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 560.

Finally, Interstate alleges that the contract award to B & L was improper because B & L's price, which is 9.5 percent higher than the cost of Interstate's fiscal year 1986 contract, is unreasonable.

A determination of price reasonableness is within the discretion of the procuring agency and will not be disturbed unless it is unreasonable or there is a showing of fraud or bad faith on the part of contracting officials. Advanced Construction, Inc., B-218554, May 22, 1985, 85-1 C.P.D. ¶ 587. Here, BIA reports that the contracting officer did compare B & L's offered price with the price of Interstate's prior contract and determined that B & L's price was reasonable. We see no reason to object to the contracting officer's decision. In this regard, it is inherent in most procurements that are limited to a particular class, including Buy Indian Act set-asides, that awards often will be at higher prices than could be obtained in unrestricted competitions. Northland Anthropological Research, Inc., B-201851, June 8, 1981, 81-1 C.P.D. ¶ 457. Consequently, the fact the bid of the eligible firm in a set-aside solicitation might be higher than a bid by a non-Indian firm does not in itself require the rejection of the bid as unreasonably high. See Advanced Construction, Inc., B-218554, supra; Browning Ferris Industries, B-209234, Mar. 29, 1983, 83-1 C.P.D. ¶ 323.

The protest is denied in part and dismissed in part. Interstate therefore is not entitled to recover its protest costs. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 C.P.D. ¶ 198.

for Seymour Efros
Harry R. Van Cleve
General Counsel